



STATE OF WASHINGTON
WASHINGTON STATE BOARD OF HEALTH

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January 3, 2007

TO: Washington State Board of Health Environmental Health Committee:
Keith Higman, Mike Shelton, and Karen VanDusen

FROM: Ned Therien, WSBOH Health Policy Analyst

**SUBJECT: ANALYSIS OF MARK COOPER'S WRITTEN TESTIMONY OCTOBER 2006:
CHAPTER 246-366 WAC -- PRIMARY AND SECONDARY SCHOOLS**

Mark Cooper provided written testimony to the State Board of Health (SBOH) for its October 18, 2006 meeting in Yakima. SBOH Member Keith Higman asked staff to consult with SBOH counsel regarding assertions in Dr. Cooper's testimony and report to the Board. Dr. Cooper's statements are summarized below and an analysis of assumptions in his statements is provided.

- 1. The SBOH should designate all employees of State and local government as enforcement agents for chapter 246-366 WAC, Primary and Secondary Schools. However, according to RCW 43.20.050(4), all individuals mentioned in the statute already have the authority to enforce the school rules even without the SBOH designating them in the rules. It would be inappropriate for the SBOH to designate "entities" undefined by law as inspection agents for the rule compliance. It is inappropriate to allow self-inspections by school districts. Such a provision might restrict the authority of the Department of Labor and Industries.*

Analysis:

RCW 43.20.050(4) lists persons required to enforce SBOH rules when directed to do so. SBOH determines which entities must comply with, conduct inspections under, and enforce each rule. In existing chapter 246-366 WAC, SBOH has made school boards responsible for complying and local health officers responsible for conducting periodic inspections. Existing rules do not designate an entity that is responsible for enforcing compliance with the rule. Without the designation of an enforcement entity in the rule, conventional governmental responsibility would fall on the local prosecuting attorney to pursue penalties for noncompliance, according to the priorities of the jurisdiction.

Nothing prohibits delegation of inspection so long as standards applied by inspectors are specified. Special training and knowledge are expected of inspectors. RCW 43.20.050(4) does not preclude SBOH from giving an entity not listed in the statute some inspection authority. As an example, under WAC 246-272A-0260, SBOH authorizes health officers to allow professional designers to inspect on-site sewage systems. These licensed professionals are expected to have special knowledge appropriate for these inspections.

It is an overly broad interpretation of statute to say that any person who is a state officer can enter a building at any time and inspect. It could be chaotic to authorize inspections by a large number of individuals in a community. Such a concept would suggest that all of these individuals should also have authority for inspecting restaurants, on-site sewage systems, and drinking water supply systems. In none of its rules has SBOH given enforcement authority to all the individuals listed in RCW 43.20.050(4).

An SBOH rule would not restrict the statutory authority of L&I to conduct inspections of schools to assure the health and safety of employees.

2. *The School Rule Development Committee (SRDC) recommended that a complaint and appeals process [for complaints] be established in chapter 246-366 WAC. The Department of Health (DOH) has refused to accept this recommendation of the SRDC. DOH's role in enforcement of SBOH rules is specified in RCW 43.70.130(3): "Strictly enforce all laws for the protection of public health...and all rules, regulations and orders of the SBOH." If DOH does not actively enforce the SBOH school rules, the SBOH should designate another [State] agency to have primary enforcement responsibility.*

Analysis:

DOH does not have authority to adopt rules for environmental health and safety in schools. SBOH has that authority and has not delegated it to DOH. DOH provides staff support to SBOH for this rule. One support activity is to propose rule language for SBOH to consider. DOH's first draft was meant to spur comment for subsequent drafts. The polarization of opinions about that draft proposal induced the SBOH to ask for briefings on rule issues so that it could give DOH direction for refining a rule proposal.

Washington State's constitution and laws give local governments primary control over local conditions within their jurisdictions. This is especially true for public health issues. Therefore, SBOH gave authority for enforcement of existing chapter 246-366 WAC to local health officers. SBOH gave no authority for enforcement of these rules to DOH. Therefore, DOH has no responsibility to enforce the rules under general conditions (though it might have some authority to enforce the rules under RCW 43.70.130(4) "when in its opinion an emergency exists." Nothing in SBOH's authority specifies that a state agency must or should be designated to hear complaints from parents and teachers. Most other SBOH rules designate the local health officer as the final authority.

An administrative appeals process is generally put in place to protect individuals from excessive government regulations or from being erroneously deprived of a license or other protected interest, for example, privacy, liberty, or property. It is less clear, however, whether SBOH could create a stand-alone process for parents or students to challenge the conditions of a school unless there was a specific statute giving DOH or another entity that authority. Even in the case of SBOH's clear authority to establish isolation and quarantine rules, a superior court judge questioned whether SBOH could set up an appeals process invoking the court's jurisdiction. SBOH's authority would have to be weighed against other authorities and rules, including those enjoyed by school boards

and those specific to another agency on which the Board might choose to impose this responsibility.

3. *A “top-down” analysis by governmental agencies has failed to accurately detect or resolve problems faced by teachers and parents regarding enforcement of chapter 246-366 WAC. The Washington Education Association, working with the Department of Labor and Industries (L&I), could better assess the problems through a review of teacher complaints. This could provide information revealing the prevalence of health and safety hazards in schools. Parents need to be able to access a functional chain-of-responsibility system to get rapid resolution of health and safety concerns.*

Analysis:

SBOH and DOH recognize that problems exist with health and safety protections for children in schools and have undertaken a deliberative process to identify changes to chapter 246-366 WAC. This process has revealed that inspection, assurance, and complaint processes vary. SBOH and DOH sought comments from parents, teachers, and L&I in this rule process. L&I has lead authority for employee health and safety protections. It has independent authority for rule making to implement such protections. L&I has no authority for protecting the health and safety of students in schools

4. *School districts would be more willing to reveal problems in schools if funds were available to remedy the problems. The State should establish a no-interest loan program to school districts to repair schools. Amnesty programs tied to the no-interest loan program would also make schools more willing to reveal problems and correct them.*

Analysis:

Funding of repairs admittedly is a dilemma for school districts. However, SBOH has no authority regarding school funding. Existing chapter 246-366 WAC does not establish penalties for violation of the rules. Therefore, the term “amnesty” does not seem to apply to the school rule. However, part of Dr. Cooper’s concept might be captured by a rule that required a plan of correction be developed by school districts when provisions of the rule are not met.

5. *DOH has authority to collect compliance data from schools. Since DOH enforces the federal Safe Drinking Water Act on a voluntary basis, it could enforce any health and safety rule adopted by the SBOH.*

Analysis:

DOH has no authority to require school districts to provide environmental compliance data to the agency under existing rules. SBOH has authority to adopt rules for the control of public health related to environmental conditions. It potentially could require schools to provide data to DOH and for DOH to collect data on environmental conditions in schools. DOH does not enforce provisions of the Safe Drinking Water Act on a truly voluntary basis. It does so to comply with rules adopted by the SBOH referencing federal rules. DOH receives federal funding to implement a drinking water program, based on federal requirements that the state adopt all of the federal drinking water rules. The

authority for adopting rules for public drinking water supplies falls to SBOH under RCW 43.20.050(2)(a).

6. *Parents can file complaints with L&I on behalf of teachers and staff to address health and safety concerns of children in school.*

Analysis:

L&I will address complaints about conditions in schools only if the complaint is related to specific impacts on employees in the schools. It may respond to complaints initiated by students and parents if the conditions complained about would put workers at risk. L&I controls how it will respond to complaints independent of SBOH rules processes.

cc: State Board of Health Members
Gregg Grunenfelder, Department of Health